

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 13, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP2047

Cir. Ct. No. 2011CV844

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STANLEY M. GERSZEWSKI AND MELISSA S. GERSZEWSKI,

PLAINTIFFS-RESPONDENTS,

V.

LYMAN OLSON, A/K/A CARL LYMAN OLSON AND DOROTHY OLSON,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Marathon County:
GREGORY B. HUBER, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Lyman Olson, a/k/a Carl Lyman Olson, and Dorothy Olson appeal a summary judgment in favor of Stanley and Melissa Gerszewski concerning a claim of adverse possession. The Olsons argue genuine issues of material fact precluded summary judgment. We disagree and affirm.

¶2 After conducting a land survey, the Gerszewskis commenced a quiet title action concerning a disputed boundary line fence. The Olsons counterclaimed, alleging adverse possession. The circuit court granted the Gerszewskis' motion for summary judgment, and dismissed the counterclaim. The Olsons now appeal.

¶3 Summary judgment methodology is well-established. We review summary judgment decisions using the same standards and methods applied by the circuit court. Under WIS. STAT. § 802.08(2),¹ a moving party is entitled to summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *See Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

¶4 On appeal, the Olsons argue the disputed land was protected by a substantial enclosure for over twenty years, and thus adversely possessed. *See* WIS. STAT. § 893.25. They contend there is “a fence ... that kept cattle in and out, and was maintained for predecessor generations of owners. A fence that did not change its character in the years following.” The Olsons further argue the boundary fence was used continuously and uninterruptedly for the statutory twenty-year period.

¶5 Affidavits submitted by the Gerszewskis in support of summary judgment established personal knowledge of the property for a twenty-three-year

¹ References to Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

period. A survey was conducted on the property in 2004. There were two dilapidated, non-maintained fences, one on either side of the true boundary line, each coming within a few feet of the boundary. Those remnant fences were present when the Gerszewskis' predecessors bought the property. The Gerszewski affidavits described the fences as "old, broken, and dilapidated" as of 1989, when they bought the property, and the fences "deteriorated further" over the time their predecessors owned the property. There was also a horse fence with white posts owned by the Olsons that ran along the southern portion of their property – but north of the surveyed boundary line. Photographs showed the land south of the Olsons' white horse fence was wild, with long grasses, bushes and some trees.

¶6 The only proof submitted in opposition to summary judgment was the affidavit of Dorothy Olson.² Dorothy stated she was her husband Lyman's "agent under a Power of Attorney." She also averred that Lyman bought the property to the north of the Gerszewskis by land contract, which he paid from 1977 through 1989. However, as the circuit court observed, she could only know about the land contract from second-hand sources, because she was not married to Lyman at the time. The record did not contain any information regarding when Dorothy married Lyman, but divorce records showed Lyman divorced his previous wife in December 1991, and therefore the marriage to Dorothy could not have been prior to June 1992.

¶7 Furthermore, the court noted "[t]he record does not clearly disclose any ownership interest held by Dorothy Olson. What the record does show is that

² We note the Olsons' brief in opposition to summary judgment in the circuit court contained no references to Dorothy Olson's affidavit.

Lyman Olson’s ownership of the property predates his marriage to Dorothy Olson.” The court also noted Dorothy Olson “makes the same claim repeatedly, referring to how “[w]e have used the property ... since ownership of the property in 1977.” The court stated: “Again, Dorothy Olson was not married to Lyman Olson in 1977[,] and she has not established any basis for having personal knowledge of the things she described in her affidavit.” Accordingly, the court concluded that when Dorothy stated in her affidavit that “we have ... used and occupied” the disputed property “for over 30 years” she could not be relying solely on her own personal knowledge.

¶8 The court also determined Dorothy’s affidavit contained vague statements such as, “we have made claim to a portion of the land ... including the boundary line fence” The affidavit also contained conclusory assertions. For example, Dorothy stated: “That we, and our predecessors in title and in interest, have maintained open, notorious, exclusive, continuous, and hostile possession and use of that portion of land up to the boundary line fence for over thirty (30) years, under claim and right of title.”

¶9 The circuit court properly discounted Dorothy’s conclusory statements, and those not based upon personal knowledge, as they are not “evidentiary facts as would be admissible in evidence.” *See* WIS. STAT. § 802.08(3); ***Helland v. Froedtert Mem’l Luth. Hosp.***, 229 Wis. 2d 751, 756, 601 N.W.2d 318 (Ct. App. 1999). The court stated that Dorothy’s affidavit:

[L]eaves only the single specific use mentioned in paragraph 8: grazing cattle. But the plaintiffs’ own proof showed an enclosed pasture area, lying north of the true boundary. Everyone agrees that there were two remnant fences, and there is no dispute that they both stood to the south of the Olsons’ enclosed pasture. Dorothy Olson’s affidavit includes no attempt to explain how they grazed cattle on land located outside their enclosure, or why the

land to the south of that enclosure is shown, in Stanley Gerszewski's photographs, to be covered with tall grass, weeds, bushes, and trees. Nor does it include any attempt to explain what other use she and her husband made of that wild, overgrown territory.

¶10 When a motion for summary judgment is made and supported, an adverse party may not rest upon the allegations or denials of the pleadings, but must set forth specific facts showing that there is a genuine issue for trial. WIS. STAT. § 802.08(3). Quite simply, the Olsons have not established the existence of a genuine dispute of material fact regarding an action for adverse possession. The court properly granted summary judgment.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

